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Supreme Court of the United States

OCTOBER TERM, 1945.

No. 978.

LESLIE G. BOWEN, PETITIONER,

VS.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petition of Leslie G. Bowen respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On July 12, 1944, an indictment in thirteen counts (R. 1 to 53) was returned against the petitioner in the

United States District Court for the Western Division of the Western District of Missouri. The first six counts charged the use of the mails in the sale of securities in pursuance of a scheme to defraud, in violation of Section 17(a) of the Securities Act of 1933 (15 U. S. C. A. 77q; 48 Stat. 84). The seventh and eighth counts charged sending through the mail, in pursuance of the same scheme to defraud, of securities not registered in accordance with the provisions of the Securities Act, in violation of Section 5a of the Act (15 U. S. C. A. 77e; 48 Stat. 906). The ninth to thirteenth counts, inclusive, charged the use of the mails in pursuance of a scheme to defraud in violation of the Mail Fraud Statute (18 U. S. C. A. 338; 25 Stat. 873; 35 Stat. 1130).

The scheme charged is set forth in the first count of the indictment and is incorporated by reference in the remaining counts. In general, it was alleged that the three defendants, Leslie G. Bowen, Peter A. Marxen and Ray H. Andrews, organized an unincorporated association, known as Bowen Industries, for the alleged purpose of financing the invention, development and perfection by the defendant (petitioner here), Leslie G. Bowen, of a washing machine, a two-speed bicycle sprocket, a speed reducer and other machines; that for the purpose of providing a means for people to invest in the company, they issued what were called "pre-organization certificates," which later were exchanged for shares of the capital stock of Bowen Industries after its incorporation; that these "pre-organization certificates" were known as "units of membership" and were sold at a cost of $100 per unit; that to obtain the investment by various persons in these pre-organization certificates, the defendants made numerous allegedly false and fraudulent misrepresentations (over thirty in number), which are set out in great detail in the indictment.

The petitioner, together with his two co-defendants, was tried by jury upon the foregoing indictment, in the District Court for the Western Division of the Western District of Missouri. As a whole the evidence was that some time about 1931 the petitioner engaged in conversations with certain persons, concerning the building of a washing machine. These various persons gave sums of money to petitioner, and a small shop was established in Independence, Missouri, for the purpose of attempting to develop and perfect the washing machine. While this work was going on the petitioner manufactured a crude model of a two-speed sprocket for use on bicycles. This sprocket, which he later improved and patented, consisted essentially of a kind of planetary gear transmission which, when mounted on a bicycle, would enable the rider to engage a low speed gear for the purpose of riding up inclines and hills.

This model was exhibited to various persons and one David Fritzlen, then an employee of the Monarch Battery Company in Chicago, became interested in the device. He desired to take the sprocket to Chicago and engage in its manufacture on a royalty basis. The petitioner and Fritzlen went to Chicago during the year 1935 and entered into written contract under which Fritzlen was to manufacture the sprocket on a royalty basis (R. 259). These plans fell through and the petitioner and his associates then determined to attempt to manufacture the sprocket themselves. Accordingly petitioner undertook to establish a plant in Chicago. He stated that it was his intention to manufacture the various machines which would be necessary to make the component parts of the sprocket, for the reason that such machines could not be purchased, and it would have been too expensive to assemble the sprocket from parts made elsewhere. Space

was rented and petitioner began to assemble and develop various machines (R. 349, 350, 351, 478, 479). This work went on over a period of approximately five years, from 1937 until 1942. In April, 1942, the company was incorporated under the laws of Illinois and for the remainder of the period, up to the date of the indictment, engaged in the successful manufacture of various small war contracts (R. 569), after failing to fill a large contract for the Philco Company, due to petitioner's failure to develop screw machines which he had advised the company he could make. The petitioner also, in addition to his patents on the bicycle sprocket, had developed and patented a speed reducer, employing the same principle. Sprockets were never actually put into production at his plant in Chicago (although some parts were made) with the exception of a few models which were manufactured in connection with his activities with Fritzlen.

A great deal of equipment was either bought by the petitioner and his associates or was manufactured by him for the purpose of manufacturing the various parts of the sprocket. The value and utility of this equipment was disputed. A government witness, at one time general manager of the company, testified (R. 193) that at the time of his employment he appraised it at $18,000. An expert appraiser, testifying for the defendant, stated (R. 423, 425) that it had a replacement value new of $234,255.96.

This project during the period it was in progress, was first financed by the sale of what were called "pre-organization certificates." These certificates were sold for $100 each by various persons, including the co-defendants and numerous others. Meetings of persons interested in this company were held in Kansas City, Kansas, in a restaurant operated by the defendant, Ray H. Andrews. At that place demonstrations would be given of the sprocket

and of the speed reducer and those present would be invited to participate if they were interested. It was in connection with these various meetings, at which the petitioner appeared from time to time, and also in connection with the sale of units at various other times and places, that the alleged misrepresentations were made. After the company was incorporated the units previously sold were exchanged for an equal number of certificates of stock in the new company. Thereafter, the company borrowed money by issuing notes to various stockholders. The total value of units sold during this period, according to the company's stock records, was $193,720.00, and $45,168.46 was borrowed by issuing notes. The mails were used in connection with all of the foregoing, and there was no registration of stock under the provisions of the Securities Act of 1933.

The evidence as to misrepresentations made by the petitioner and the other defendants, as to the petitioner's activities in Chicago, and as to the disposition of the proceeds of sales of units and of loans, was conflicting. There was substantial evidence on the part of the government that many of the alleged misrepresentations laid in the indictment, and also others, were in fact made and that large sums of money obtained by the petitioner and his associates were unaccounted for. On the other hand, there was substantial evidence on the part of the petitioner, including some of the government's own witnesses, that he did not make the representations alleged in the indictment and that those representations which he did make were either true or he had ample reason to believe them to be true, and that the sums obtained from investors which came into his hands were applied for the purpose of furthering the development and manufacture of the bicycle sprocket and other inventions. There was no evi-

dence that petitioner had spent unusual sums for personal expenditures.

At the close of the evidence, petitioner's motion for a directed verdict was overruled, and the cause was submitted to the jury. After the jury had deliberated for ten or twelve hours, the foreman sent a written communication to the Court (R. 591) which the Court told petitioner's counsel stated that the jury was hopelessly deadlocked. It later appeared that the jury's message actually read "This jury is deadlocked on a 11 to 1 verdict. F. B. Alderson, Foreman" (R. 595). The Court thereupon called the jury into the courtroom and verified the contents of the note by stating to the jury he assumed they had not reached a verdict, to which the foreman replied in the affirmative (R. 591). He then gave the supplemental charge appearing at R. 591, 592 and 593, and which in substance advised the jury that it was important that the case be decided, that they should take proper respect to each other's opinions and that if the larger part of the panel was for conviction, a dissenting juror should consider whether his doubt was reasonable; that if a majority was for acquittal, the minority should consider whether their judgment was correct, combined with a direction to consider whether the defendants were not guilty and a further direction to render a verdict of guilty in the event they found a defendant guilty. The instruction so given closely followed the one in *United States* v. *Allis*, 73 Fed. 165, l. c. 183, affirmed *Allis* v. *United States*, 155 U. S. 117, 39 L. Ed. 91, and in *Allen* v. *United States*, 164 U. S. 492, 41 L. Ed. 528. To this charge the petitioner excepted and moved that the jury be discharged on the ground that the charge, coming immediately after the jury's message, invaded the province of the jury, was coercive and was an invitation to render a verdict of guilty (R. 593). This

motion was overruled, and the jury was sent to bed for the night. At 10:30 A. M. the next morning (R. 604) a verdict was returned finding the petitioner guilty on all counts, and acquitting his co-defendants. The petitioner was sentenced to three years on each count, to be served concurrently.

The petitioner duly prosecuted his appeal to the Circuit Court of Appeals for the Eighth Circuit, assigning as error, among other things, the action of the District Court in giving the foregoing supplementary instruction, after being advised of the numerical division of the jury (R. 84 to 88), on the ground that the action of the trial Court was contrary to the holding in *Brasfield* v. *United States,* 272 U. S. 448, 71 L. Ed. 345. The United States Circuit Court of Appeals for the Eighth Circuit, by judgment entered February 21, 1946, affirmed the judgment and sentence of the District Court.

The ruling of the Court of Appeals upon the supplementary instruction aforesaid, given immediately after the court was advised of the numerical division of the jury, is the sole question presented by this petition.

B.

JURISDICTIONAL STATEMENT.

(1) The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, the Act of March 3, 1911, Ch. 231, Sec. 240, 36 Stat. 1157, as amended 43 Stat. 938 (28 U. S. C. A., Sec. 347(a)), which empowers this Court to review by certiorari the judgments of the Circuit Courts of Appeal in criminal cases, upon the petition of any party thereto; the provisions of the Act of February 24, 1933, Ch. 119, Sec. 1-3, 47 Stat. 904, as amended by the Act of March 8, 1934, Ch. 49,

48 Stat. 399, as amended 48 Stat. 926 and 49 Stat. 1921 (18 U. S. C. A., Sec. 688), which empowers this Court to prescribe by rule the times for and manner of applying for writs of certiorari in criminal cases; and, the provisions of Rule 11 of the Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilt of the Supreme Court of the United States, promulgated by this Court May 7, 1934, as amended, which provides that petition for certiorari in criminal cases shall be filed within thirty days of the entry of the judgment of the appellate court, and shall be made as prescribed in Rules 38 and 39 of the Supreme Court of the United States.

(2) The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered February 21, 1946 (R. 618). Thereafter that Court stayed its mandate until March 30, 1946, pending the filing of petition for certiorari by the petitioner (R. 619). This petition is filed prior to that date, and within thirty days from the entry of the judgment in the Court of Appeals, as required by Rule 11 above.

(3) The statutes set out in (1) above provide that this Court shall have the power to review by certiorari, the judgments of the Circuit Courts of Appeal in criminal cases, and to make rules governing petitions for certiorari. Rule 11 set out in (1) above provides such petitions shall be made in accordance with Rules 38 and 39 of this Court. This Court has jurisdiction under those statutes and under that provision of Rule 38 (5) (b) of this Court, which provides that this Court may grant certiorari where a Circuit Court of Appeals "has decided a federal question in a way probably in conflict with applicable decisions of this Court." The judgment of the Circuit Court of Appeals sustaining the trial court in giving the coercive instruc-

tion to the jury immediately after being advised by the jury that it was numerically divided 11 to 1, is in conflict with the decisions of this Court in *Burton* v. *United States*, 196 U. S. 283, 49 L. Ed. 482 and *Brasfield* v. *United States*, 272 U. S. 448, 71 L. Ed. 345.

C.

THE QUESTION PRESENTED.

By sustaining the trial Court in giving the supplementary instruction to the jury urging agreement, directing the minority to consider the opinion of the majority and directing the jury to consider whether the petitioner was not guilty of some count, immediately after the jury had voluntarily by written message advised the Court it was deadlocked at 11 to 1, and the Court had verified the message by the general question that he assumed they had not reached a verdict to which the foreman replied in the affirmative, did the Court of Appeals decide a federal question in a way probably in conflict with the decisions of this Court in *Burton* v. *United States*, 196 U. S. 283, 49 L. Ed. 482 and *Brasfield* v. *United States*, 272 U. S. 448, 71 L. Ed. 345?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The decision of the Circuit Court of Appeals upon the question presented by the trial Court's action in giving a coercive instruction to the jury immediately after he was advised by the jury in writing that it was deadlocked and numerically divided 11 to 1 and after he had verified that information as before set out, is in conflict

with the decisions of this Court in *Burton* v. *United States*, 196 U. S. 283, 49 L. Ed. 482 and *Brasfield* v. *United States*, 272 U. S. 448, 71 L. Ed. 345, and is a ground for review by certiorari by this Court under that part of Rule 38(5)(b) of this Court, which provides that this Court may grant certiorari where a Circuit Court of Appeals "has decided a federal question in a way probably in conflict with applicable decisions of this Court." This Court, in *Burton* v. *United States*, strongly condemned a verification by the trial court as to the numerical division of the jury after he was advised of it by written message. The case was reversed on other grounds. Thereafter this Court held, in *Brasfield* v. *United States*, that the inquiry alone, as to how the jury stood numerically, without an indication as to the position of the majority upon the issues, was reversible error. The reason given was that such a inquiry is coercive. Where, as here, a trial Court by written message is voluntarily advised by the jury as to its numerical division, and the Court verifies that information by stating in the form of an inquiry that he assumes they have not reached a verdict, and then immediately gives an instruction urging a verdict and directing the minority to consider the opinion of the majority, a coercion is presented more certain and demonstrable than the mere inquiry as to the jury's numerical division, standing alone. The Court of Appeals decided this question in a manner in conflict with the applicable decisions of this Court.

E.

PRAYER FOR WRIT.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the

Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 13066, Leslie G. Bowen, Appellant, vs. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of the said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated March 15, 1946.

Leslie G. Bowen,
Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

LESLIE G. BOWEN, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is not yet reported. It is set out in full in the record (R. 607-618).

II.

JURISDICTION.

1. The date of the judgment to be reviewed is February 21, 1946 (R. 618).

2. The statutory provisions which are believed to sustain the jurisdiction of this Court are Section 240(a) of the Judicial Code, the Act of March 3, 1911, Ch. 231, Sec. 240, 36 Stat. 1157, as amended 43 Stat. 938 (28 U. S. C. A., Sec. 347(a)); the Act of March 8, 1934, Ch. 49, 48 Stat. 399, as amended 48 Stat. 926 and 49 Stat. 1921 (18 U. S. C. A., Sec. 688); Rule 11 of the Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilt of the Supreme Court of the United States, promulgated by this Court May 7, 1934, as amended; and that provision of Rule 38(5)(b) of the Rules of the Supreme Court of the United States, which provides that this Court may grant certiorari where a Circuit Court of Appeals "has decided a federal question in a way probably in conflict with applicable decisions of this Court."

3. After the jury had deliberated for some time, it advised the Court by written message that it was deadlocked 11 to 1 (R. 595). The Court thereupon called the jury into the court room and stated that he assumed they had not reached a verdict, to which the foreman replied in the affirmative. The Court immediately gave a supplementary instruction to the jury, stating that the case should be decided, that the minority should consider the opinions of the majority and that they should consider whether the petitioner was not guilty of some count. To this action the petitioner excepted and moved that the jury be discharged, which motion was denied. Upon appeal, the petitioner assigned as error the foregoing action of the trial Court. The Court of Appeals sustained the trial Court and affirmed the conviction.

4. The judgment of the Circuit Court of Appeals upon the foregoing question is in conflict with applicable decisions of this Court in *Burton* v. *United States*, 196 U.

S. 283, 49 L. Ed. 482 and *Brasfield* v. *United States*, 272 U. S. 448, 71 L. Ed. 345.

III.

STATEMENT OF THE CASE.

The petitioner has stated the case in the Summary Statement of the Matter Involved, Part A of his foregoing Petition for Certiorari, which statement is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERROR.

The Circuit Court of Appeals for the Eighth Circuit erred in sustaining the trial Court's refusal to discharge the jury after giving a supplementary instruction to the jury urging agreement and directing the jury to consider whether the petitioner was not guilty of some count, immediately after the jury had voluntarily, by written message, advised the Court it was deadlocked 11 to 1 and the Court had verified the message by the general question that he assumed they had not reached a verdict, to which the foreman replied in the affirmative.

V.

ARGUMENT.

The decision of the Court of Appeals sustaining the trial Court's coercive instruction to the jury after the Court was advised of the jury's numerical division, is in conflict with applicable decisions of this Court.

After the trial Court had charged the jury and the jury had deliberated for ten or twelve hours, the foreman of the jury sent a written communication to the Court (R. 591) which the Court told petitioner's counsel stated that the jury was hopelessly deadlocked. It later appeared that the jury's message actually read "This jury is deadlocked on a 11 to 1 verdict. F. B. Alderson, Foreman" (R. 595). The Court thereupon called the jury into the courtroom and stated that he assumed they had not reached a verdict, to which the foreman replied in the affirmative. He then gave the supplemental charge appearing at R. 591, 592 and 593, and which in substance advised the jury that they should take proper respect to each other's opinions and that if the larger part of the panel were for conviction, a dissenting juror should consider whether his doubt was reasonable; that if a majority were for acquittal, the minority should consider their judgment, combined with a direction to consider whether the defendant was not guilty and a further direction to render a verdict of guilty in the event they found a defendant guilty. To this charge the petitioner excepted and moved that the jury be discharged on the ground that the charge invaded the province of the jury, was coercive and was an invitation to render a verdict of guilty (R. 593).

The foregoing supplementary charge to the jury, given by the Court after he was advised that the jury was divided

eleven to one, and after the jury knew that the Court was so advised, was coercive, and the petitioner's exception and motion to discharge the jury should have been sustained. The Court of Appeals sustained the trial Court. Its action was contrary to applicable decisions of this Court in *Burton* v. *United States,* 196 U. S. 283, 49 L. Ed. 482 and *Brasfield* v. *United States,* 272 U. S. 448, 71 L. Ed. 345.

The supplemental charge is almost verbatim the charge given in *United States* v. *Allis,* 73 Fed. 165, l. c. 183 (1893), affirmed on appeal, *Allis* v. *United States,* 155 U. S. 117, 39 L. Ed. 91 (without consideration of this charge, however). The Allis case was followed by *Allen* v. *United States,* 164 U. S. 492, 41 L. Ed. 528 (1896), from which the authority for the instruction is derived, sometimes called the "Allen instruction."

The petitioner is not concerned with the propriety of the foregoing instruction, nor modifications of it, standing alone and in a proper case. In any case such an instruction, after the jury has deliberated for a period of time, is in a sense coercive. It is given for that purpose—an endeavor by the court to exert pressure upon the jury to arrive at a verdict. To a lay juror this instruction, even standing alone, no doubt often creates the impression, erroneous or not, that the kind of verdict desired is a verdict of guilty. However, the courts usually hold that this instruction is not coercive in a sense requiring reversal, where it is given at a proper time, properly safeguarded, and unattended by factors which render it prejudicial. In the instant case there were other factors which did render the instruction coercive, and prejudicial. The jury had advised the Court they were deadlocked at eleven to one. He had verified this information—cautiously, it is true, but there could be no question to what he was referring. He knew how they stood and they knew he knew.

Inquiries by courts as to the numerical division of juries were condemned by this Court in *Burton* v. *United States,* 196 U. S. 283, 49 L. Ed. 482 (1905). In this case, after deliberating for some time, jury was brought back to the court room. The Court indicated he had received a letter from them, and in connection with it he asked the foreman how they were divided, stating that he did not want to know how many stood one way and the other way. The foreman stated that they stood 11 to 1 and the Court stated that *he gathered that from the communication.* He then gave the jury the instruction in the *Allen* case (196 U. S. 305). Counsel then requested that he instruct the jury that the requests of the defendant which were given in his main charge were as much a part of the Court's charge as that which he read as emanating from the Court itself. This he refused to do. In connection with this action, and also in connection with his inquiry as to the division of the jury, this Court stated l. c. 196 U. S. 307:

> "Balanced as the case was in the minds of some of the jurors, *doubts existing as to the defendant's guilt in the mind of at least one,* it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. * * * *A slight thing may have turned the balance* against the accused under the circumstances shown by the record, and he ought not to have longer remained burdened with the characterization of his requests to charge, made by the court, * * *
>
> "We must say in addition, that a practice ought not to grow up of inquiring of a jury, when brought into court because unable to agree, how the jury is divided; not meaning by such question, how many stand for conviction or how many stand for acquittal, but meaning the proportion of the division, not which way the division may be. Such a practice is not to be commended, because we cannot see how it may be

material for the court to understand the proportion of division of opinion among the jury. All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and *we do not think that the proper administration of the law requires such knowledge* or permits such a question on the part of the presiding judge" (Italics supplied).

The only difference between the *Burton* case and the present case, upon the question under discussion, is that there the Court verified the communication he had by asking the jury if it were correct, and here the Court after receiving the message stated he assumed they were unable to agree, and the foreman said that was correct.

After the *Burton* case, the appellate courts disagreed whether it was authority for holding the inquiry alone was prejudicial. Finally the conflict was resolved by the case of *Brasfield* v. *United States*, 272 U. S. 448, l. c. 449, 71 L. Ed. 345 (1926), where it was held, l. c. 272 U. S. 449:

"The jury having failed to agree after some hours of deliberation, the trial judge inquired how it was divided numerically, and was informed by the foreman that it stood nine to three without indicating which number favored a conviction.

"In *Burton* v. *United States*, 196 U. S. 283, 307, 49 L. Ed. 482, 490, 25 Sup. Ct. Rep. 243, where a conviction was reversed on other grounds, this court condemned the practice of inquiring of a jury unable to agree, the extent of its numerical division, although a response indicating the vote in favor of or against conviction was neither sought nor obtained. This court then said (p. 308): 'We do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge.' * * *

"We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned."

The conflict of the decision of the Court of Appeals upon the question under consideration with the decisions in the *Burton* and *Brasfield* cases, is clear. In those cases, the condemnation of this Court was directed against the coercive effect of such an inquiry standing alone, that is to say, the coercive effect arising from the fact that the Court knows how the jury stands and the jury knows that he knows. How much more coercive upon the jury must it be when the Court is advised in writing of the numerical division of the jury, recalls them to the court room, states that he assumes that they have not reached a verdict (which remark could not possibly refer to anything except the message), the foreman replies in the affirmative and the Court thereupon gives a coercive instruction, which of itself has been often criticized.* The

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*Indeed, the Court which rendered the decision here, said, with reference to this type of instruction in *Nick et al. v. United States*, 122 Fed. 2d 660 (C. C. A. 8th, 1941), l. c. 674:

rule of the *Brasfield* case, contrary to the holding of the Court of Appeals, does not need to be extended to cover this situation. The rule of the *Brasfield* case extends beyond the boundaries of the question here presented.

The Court of Appeals in passing upon the applicability of the *Burton* and *Brasfield* cases stated (R. 616) that it was asked to expand the rule of the *Brasfield* case and to hold that if the foreman of a jury without any inquiry informs the Court that the jurors stand 11 to 1, reversible error is committed, or that in any event, the trial judge must not give any supplemental instruction to the jury. That is not the application which the petitioner urges the *Brasfield* case has to the facts here at issue. When a message of this sort is received, the Court may certainly and with propriety advise the jury that it is improper to send such information and for them to continue their deliberations. It might not then be improper at a later stage and after further deliberation, for the Court to give some further instruction depending on circumstances, and making clear that there is no reference to any message. But, where the Court is advised of the numerical division of the jury, *verifies* the information, and *immediately* directs the minority to consider the opinions of the majority, such action is squarely within the reason upon which the condemnation in the Brasfield case is based.

"There have been criticisms of this general character of instruction in several cases cited by appellants. It seems to us any vice in this kind of statement depends upon the situation at the time it is given and upon the language used by the court. The objection is, of course, that such character of instruction may have coercive effect upon jurors. *If such statement is made in the face of an existing disagreement in the jury it is quite evident that its entire force would be felt as applying to an existing situation which had developed. Language which might be innocent if uttered before submission of the case to the jury might be regarded as harmful if applied to a specific existing disagreement*" (Italics supplied)

The Court of Appeals was not entirely satisfied with the logic of its position with reference to the alternatives offered the trial judge. Later (R. 617) it stated the jury had thirty-four issues of fact to decide, that is, there were three defendants, thirteen counts were submitted against two of them and eight counts against the third. The Court then observed:

> "We think it is safe to say that to any competent and experienced trial judge, the foreman's note would mean nothing more than that the jury had been unable to agree on all issues and were split eleven to one on some issue. The note reasonably could not be taken to mean that the jurors were divided eleven to one on every issue submitted."

We do not believe that the foreman's note would have had such meaning. The petitioner was charged with devising a fraudulent scheme, the same scheme was charged in each count, which were merely charges of various uses of the mail in furtherance of the scheme. The use of the mails as charged in all of the counts was admitted (R. 584). The only question was whether the mailings were done in pursuance of the same fraudulent scheme. The message of the jury, in the light of the facts, or of common forensic experience, could have meant nothing except that the jury was divided 11 to 1 on the general proposition of guilt of devising a fraudulent scheme, and doing various things to further it. In the present case, the trial court did not first inquire as to the division, he was told. But precisely the same harm was done here as if he had made the initial inquiry.

The appellee in the Court of Appeals contended that it was the *public* disclosure of the jury's division which this Court holds works the harm. It is submitted that the manner of the disclosure has nothing to do with the ques-

tion at issue. After the judge is possessed of knowledge of the jury's numerical division, no matter how he acquires it, and the jury knows he knows, anything the judge does will be interpreted by the majority on the jury as supporting their position, and by the minority as casting the weight of the court's influence into the scales against them. Here the Court, after receiving the message, and verifying it, instructed the jury that "a dissenting juror should consider whether a doubt in his own mind is a reasonable one" and that, "*in order to acquit*"—not "in order to convict"—*they must find the defendant not guilty of any of thirteen counts,* and if they found him guilty of *any*, they "*should return a verdict of guilty*" (R. 592). Under the circumstances, how could this have been anything but a ready tool for the majority to impress a dissenting juror with the argument that the court was demanding a verdict of guilty? How can it be contended that this was not "A slight thing (which) may have turned the balance against the accused" within the condemnation of this Court in the *Burton* case, or the bringing to bear of an "improper influence upon the jury" condemned in the *Brasfield* case?

The Court of Appeals stated that if a new trial had been granted there would not have been "the slightest assurance that a second trial would benefit anyone" (R. 618). The question presented to the Court was not whether a new trial would benefit anyone. The question was whether error was committed in the trial of the case before it. The conviction of the appellant depended upon establishing his guilty intent. The proof of that intent was circumstantial, and the evidence was conflicting. He had a right to have the question of his intent decided by the unanimous agreement of a jury of twelve men, uninfluenced by any outside pressure of any kind or degree. That right, under the circumstances here, this Court has pre-

served to him in its decisions in *Burton* v. *United States*, 196 U. S. 283, 49 L. Ed. 482 and *Brasfield* v. *United States*, 272 U. S. 448, 71 L. Ed. 345. That right was denied him by the judgment of the Court of Appeals.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari, and thereafter reviewing and reversing said decision.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 978

LESLIE G. BOWEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 607–618) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 21, 1946 (R. 618–619). The petition for a writ of certiorari was filed March 21, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Crimi-

nal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court erred in giving a supplemental instruction to the jury urging agreement after the foreman had volunteered, by written message, the unsolicited information that the jury was deadlocked 11 to 1.

STATEMENT

An indictment in thirteen counts was returned against petitioner and two others charging them with violations of the fraud (Sec. 17 (a)) and registration (Sec. 5 (a)) provisions of the Securities Act of 1933, 48 Stat. 77, 84 (15 U. S. C. 77q and 77e), and of the mail fraud statute (Crim. Code, § 215, 18 U. S. C. 338) (R. 1–53). Petitioner was found guilty on all counts (R. 59–60), and he was sentenced to imprisonment for a period of three years on each, the sentences to run concurrently (R. 61–62). His codefendants were acquitted (R. 59–60). On appeal to the Circuit Court of Appeals for the Eighth Circuit, the conviction was affirmed (R. 618).

The case for the Government showed without dispute that some time about 1931 or 1932 petitioner interested certain persons in financing a plan to manufacture and sell several devices he had developed, including a motorless washing machine, a two-speed bicycle sprocket, a speed reducer, a pedal boat, and a refrigerator (R. 124,

125, 129, 139–140, 148, 155–156, 194, 210, 216, 221, 223, 231, 238, 255–256, 260, 262, 263–264, 376, 387). In 1935 petitioner opened a shop in Chicago to make some of these devices (R. 349–351, 478–479). The project began as an unincorporated association called Bowen Industries and was financed by the sale by the several defendants and others of "pre-organization certificates" at $100 each (R. 124, 155, 158–159, 209, 268). In April 1942, the enterprise was incorporated as Bowen Industries, Inc., and in 1943 stock was issued in exchange for the pre-organization certificates (R. 487, 566–567). Thereafter the company was financed by issuing notes to various stockholders (R. 133, 137, 152–153). According to the company records, $193,720 was obtained from the sale of the pre-organization certificates and $45,168.46 from the issuance of the promissory notes (R. 115).

It was not disputed that petitioner was the organizer of the project and at all times controlled its activities (R. 126, 253–255, 277, 367, 383, 510, 513, 535–536). He was president of the corporation and a majority stockholder (R. 124–128, 131, 132, 211, 393). The project was a failure.

As the court below pointed out (R. 611–612), the main issue at the trial was whether petitioner's "project was conceived and was executed by him and his co-defendants in good faith and without intent to defraud purchasers of the securities, or whether it was a scheme to defraud and

to obtain money by false and fraudulent representations and promises." However, since the sufficiency of the evidence is not challenged and petitioner expressly concedes that "there was substantial evidence on the part of the government that many of the alleged misrepresentations laid in the indictment, and also others, were in fact made and that large sums of money obtained by the petitioner and his associates were unaccounted for" (Pet. 5), we deem it unnecessary to set forth the evidence in this regard. And, as exhaustively presented and analyzed in the opinion of the court below (R. 612–615), the records of the company in evidence tended to show "that Bowen and his co-defendants did not keep adequate books and records and that it was impossible to determine from such files and records as they kept whether the funds furnished by investors were properly or improperly expended" (R. 614).

The sole issue raised by the petition concerns the propriety of the supplemental instruction given by the trial judge when, after the jury had deliberated for approximately 12 hours (R. 586, 587–588, 590), the foreman of the jury sent a written communication to the judge (R. 591) which read, "This jury is deadlocked on a 11 to 1 verdict. F. B. Alderson, Foreman" (R. 595). After receiving this note, the judge called the jury into the courtroom and stated that he assumed they had not reached a verdict, to which the foreman replied in the affirmative (R. 590–591,

603). The trial judge then gave the jury the so-called "Allen instruction," urging the jury if possible to reach a verdict (R. 591–593).[1] Petitioner excepted to this supplemental charge and moved that the jury be discharged on the ground that it was coercive and an invitation to render a verdict of guilty (R. 593). At no time did the judge inquire or solicit information as to how the jury was divided numerically, nor at any time did he inquire nor was he informed as to the issues upon which they were deadlocked, as to which defendants the deadlock concerned, or as to whether the jury's numerical division was preponderantly for a verdict of guilty or of acquittal.

[1] The full text of this instruction follows:

"Gentlemen, you understand that it is desirable that you agree upon a verdict. You have put in a long hard day of work; you may be tired; you may have the short-comings that I have when I get tired; sometimes I am not open-minded, putting it mildly, as I am on other occasions. It would probably be a good thing for you to go home and quit your deliberations and be back in the morning refreshed. The trial has been rather long and it has been a rather expensive trial. The failure to agree upon a verdict will necessitate another trial, equally expensive. It seems to me that the case cannot be again tried more exhaustively than it has been on each side. It is therefore very desirable that you agree upon a verdict. I do not desire that any man shall surrender his conscientious convictions. On the other hand, each juror should perform his duty conscientiously and honestly, according to the law and the evidence. And, although the verdict to which a juror must agree must be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet in order to bring twelve men to a unanimous result, you must examine

ARGUMENT

Petitioner concedes the propriety of the so-called "Allen instruction" standing alone (Pet. 17). See *Allen* v. *United States,* 164 U. S. 492;

the question submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at sometime be decided, that you are a jury selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other.

"In the present case the burden of proof is upon the United States to establish its case beyond a reasonable doubt, and if, upon any count of the indictment submitted to you, you have a reasonable doubt, based upon the evidence, of the guilt of the defendant, you ought to acquit on that count, but in conferring together you ought to take proper respect to each others opinions, with a disposition to be convinced by such others [sic] arguments, and, on the other hand, if much the larger part of your panel are for conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, who have heard the same evidence, with the same intention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows. In order to acquit the defendant of the charges submitted to you, thirteen in number, you must consider all of them, and find that he is not guilty of any of them. On the other hand, if you find he is guilty of any of them, you should return a verdict of guilty, and when I say 'he' I am speaking in the collective sense in referring to all the defendants.

United States v. *Allis,* 73 Fed. 165, 182 (E. D. Kan. 1893), affirmed, 155 U. S. 117. He urges, however, that the fact that the jury had volunteered to the court, although privately, information as to their numerical division, tended to make this instruction coercive of a verdict of guilty. Petitioner further argues that the effect of this circumstance brings the situation within the proscription of *Burton* v. *United States,* 196 U. S. 283, 307–308, and *Brasfield* v. *United States,* 272 U. S. 448. (Pet. 16–24.)

The *Burton* and *Brasfield* cases involved the giving of the "Allen instruction" after *inquiry* by the trial judge as to the numerical division of a deadlocked jury.[2] There is no question that these cases hold it to be reversible error for a trial judge to give the instruction after having *publicly inquired* in open court as to the numerical division of a deadlocked jury. However, it

"You may conduct your deliberations as you cho[o]se, but I suggest that you now retire, in the morning after resting this evening, and carefully consider again the evidence relating to a few counts, for instance, one or the other of the groups as I have grouped them in my charge to you.

"I think, gentlemen, you fully understand the spirit in which I have said what I have just said to you. I need not elaborate on it further, but I will ask you to return in the morning at such time as may be determined among yourselves, for the reasons that I have stated. You may be excused, Gentlemen."

[2] While it does not appear from the *Brasfield* opinion that the inquiry was followed by a supplemental instruction, the record in that case (No. 243, Oct. T. 1926, pp. 106–107) shows that an instruction in substance the same as that in the *Allen* case was given by the trial judge.

is clear that the decisions of this Court in those cases turn on the potentially coercive effect of the public inquiry by the court as to the numerical division of the jury and the potential pressure from the required public disclosure as to how the jury stands numerically. The crux of the holding in the *Brasfield* case is the statement that:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. * * * (272 U. S. at 450.)

Under similar circumstances of public inquiry by the trial court, the Circuit Court of Appeals for the Fifth Circuit in *Kesley* v. *United States,* 47 F. 2d 453, 454, stated:

> Because of the imputation of stubbornness, or worse, which is likely to arise if the numerical division of the jury is publicly revealed, to require disclosure of it is held error *per se* in the courts of the United States.

It seems clear, therefore, that the mischief lies in the public inquiry and the required public disclosure by the jury and not in the mere fact that the trial judge knows how the jury is numerically divided. Indeed, it is unrealistic to assume that the mere knowledge of the trial judge of the numerical division makes the otherwise appropriate "Allen instruction" coercive, since an experienced trial judge would normally assume from the fact that the jury reports a deadlock that a

majority stands one way and a minority another, and the jury, unless exceedingly naive, undoubtedly would realize that the judge operates on that assumption. Yet, it is well established that giving the "Allen instruction" after the jury reports it is hopelessly divided, deadlocked, or even that a majority favors one side, is not so coercive as to lay the foundation for reversal. *United States* v. *Olweiss,* 138 F. 2d 798, 800 (C. C. A. 2), certiorari denied, 321 U. S. 744; *Weathers* v. *United States,* 126 F. 2d 118, 119 (C. C. A. 5), certiorari denied, 316 U. S. 681; *Culp* v. *United States,* 131 F. 2d 93, 101 (C. C. A. 8); *Lucas* v. *United States,* 275 Fed. 405, 407 (C. C. A. 8), certiorari denied, 258 U. S. 620. Where, therefore, a public probing for information as to the jury's numerical division is absent, the logic of the *Brasfield* case is inapplicable and the situation is within the established rule of the *Allen* case.

It is unnecessary here, however, to speculate as to whether the giving of the supplemental instruction after the jury had volunteered in writing the proportion of their numerical division might have been coercive. The facts speak otherwise. When the jury finally retired after the trial judge had given the "Allen instruction," it had under consideration the guilt or innocence of three persons. The jury was excused for the night and did not resume its deliberations until the following morning, and at that time deliberated for more than an hour before returning a

verdict (R. 592–593, 604). And that verdict acquitted two of the defendants and found only petitioner guilty. If the circumstances were coercive of a verdict of guilty, as petitioner contends, one would reasonably have expected not only that the jury would have returned a verdict much more quickly than it did (see *Weathers* v. *United States, supra*), but also that it would have convicted all the defendants.

CONCLUSION

The decision below is correct and the case does not involve any real conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

OCTOBER TERM, 1945.

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LESLIE G. BOWEN, PETITIONER,

VS.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

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REPLY BRIEF FOR THE PETITIONER.

ARGUMENT.

The petitioner desires to make a few brief observations upon certain statements appearing in the respondent's brief.

The respondent states (Br. 6): "Petitioner concedes the propriety of the so-called 'Allen instruction' standing alone." This is inaccurate. The petitioner states (Pet. 17): "The petitioner is not *concerned* with the propriety of the foregoing instruction, nor modifications of it, standing alone, and *in a proper case.*" This is quite different from conceding the propriety of the instruction. In fact, petitioner cites a criticism of this instruction by the same court that rendered the decision below (Pet. 20).

The respondent endeavors to answer petitioner by stating that it is the "public" disclosure of the jury's numerical division which is condemned in the *Burton* and *Brasfield* cases (Br. 7 and 8). Petitioner submits that what this court condemns in those cases is the coercive effect of an instruction such as the one here, when the judge knows the numerical division of the jury and the jury knows that he knows. All proceedings in a court of law should be public. Is it contended, if a judge were privily to send an inquiry to a jury as to its numerical division and were to receive a written answer which he did not announce, and were then to give the supplementary instruction here given, that such behaviour would not be within the condemnation of the *Burton* and *Brasfield* cases? Respondent states (Br. 8) that it is "unrealistic to assume that the mere knowledge of the trial judge of the numerical division makes the otherwise appropriate 'Allen instruction' coercive." Petitioner makes no such contention. The petitioner contends that when the knowledge of the judge as to the numerical division is *known to the jury* and is made the subject of a *direct inquiry* as here, the instruction here given, always in a sense coercive, is reversible error.

Respondent further states (Br. 9):

> "Yet, it is well established that giving the 'Allen instruction' after the jury reports it is hopelessly

divided, deadlocked, or even that a majority favors one side, is not so coercive as to lay the foundation for reversal. *United States* v. *Olweiss*, 138 F. 2d 798, 800 (C. C. A. 2), certiorari denied, 321 U. S. 744; *Weathers* v. *United States*, 126 F. 2d 118, 119 (C. C. A. 5), certiorari denied, 316 U. S. 681; *Culp* v. *United States*, 131 F. 2d 93, 101 (C. C. A. 8); *Lucas* v. *United States*, 275 Fed. 405, 407 (C. C. A. 8), certiorari denied, 258 U. S. 620."

These cases are not authority for the proposition stated by respondent. In *United States* v. *Olweiss*, the jury reported it was "hopelessly divided." The Court did not give the Allen instruction but told the jury the case involved a simple question, to discuss the facts and that if there were any question of law he would be available to help them (138 F. 2d 800). In *Weathers* v. *United States*, the jury reported it was "hopelessly disagreed" (126 F. 2d 119). In *Culp* v. *United States*, the jury reported it was "unable to agree" (131 F. 2d 101). *Lucas* v. *United States* was decided in 1921, before the decision in the *Brasfield* case, which was decided in 1926. In none of the cases above, except the Lucas case, did the jury advise the court of its numerical division or did the judge verify any such report, or make any inquiry in that respect.

Respondent finally states (Br. 9) that it is unnecessary to speculate as to whether the giving of the instruction might be coercive for the reason that the jury had under consideration the guilt or innocence of three persons. Respondent infers from the fact that two were acquitted that the instruction therefore could not have been coercive and further states that the jury would have returned a verdict much more quickly than it did, had the instruction been coercive. After the instruction here was given, the jury was sent to bed for the night and deliberated about an hour in the morning before returning its verdicts. That is a very brief time for a jury's final

discussion, final vote and drawing up of verdicts. The fact that two of the defendants were acquitted might just as reasonably be said to indicate that the final verdicts were a compromise induced and coerced by the judge's charge, which fact in itself would be just as destructive of the rights of the petitioner, as had he been the sole defendant. Respondent is undertaking to speculate upon the effect of what this court said in the *Brasfield* case would "often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts" (272 U. S. 450, 71 L. Ed. 346).

CONCLUSION.

It is respectfully submitted that the petition should be granted.

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